Mohamed Hanan bin Mohammed Ali (trading under the name and style of Matrix Fitness Technology) v Badan Pengurusan Bersama Damansara Foresta

HIGH COURT (KUALA LUMPUR) — CIVIL APPEAL NO WA-11ANCvC-40–03 OF 2021
MOHD ARIEF JC
29 SEPTEMBER 2021

Civil Procedure — Striking out — Appeal against order allowing striking out — Whether appellant had valid cause of action — Whether there were triable issues — Whether there was dispute as to ownership of the equipment and right to rental — Whether the validity of the agreement was disputed — Whether there was lack of particulars for amount claimed — Whether reliefs sought were within powers of the magistrate's court — Rules of Courts 2012 O 18 r 19

This was an appeal by the appellant against the decision of the learned magistrate for allowing the striking out application filed by the respondent. The appellant claimed that on 26 August 2019, he had provided for rental two treadmills for the use of the respondent with the rentals of RM1,011 per month each for a period of 24-months. The respondent did not pay for the rental of the two units up to July 2020 and as a result the appellant tried to repossess the said equipment. The appellant by a letter dated 21 July 2020 terminated the agreement to rent the said equipment. However, until to date, the respondent continued to stop any attempt by the appellant to regain possession of the equipment. Therefore, the appellant filed a claim in the magistrate's court. The respondent denied the allegations made by the appellant and also filed a counterclaim against a resident of the property who it alleged had acted wrongfully as chairperson of the joint management body and should be made personally liable for the rentals owed to the appellant. The respondent further applied to strike out the appellant's claim pursuant to O 18 r 19(1)(a), (1)(b), (1)(c) and/or (1)(d) of the Rules of Court 2012. The respondent submitted that the claim against it should be struck out on the following grounds: (a) the writ was issued wrongly and not in Form 2A; (b) the appellant's solicitors did not sign the writ of summons; (c) the claim was premature as it was made for the period until May 2022; (d) the magistrate court did not have jurisdiction to make any declaratory relief; (e) the magistrate court did not have jurisdiction over immovable property; (f) the contract was invalid; (g) the appellant was suing the wrong party; and (h) the claim was an abuse of process of the court. The learned magistrate allowed the application and hence this appeal.

Held, allowing the appeal with costs, and remitting matter to the magistrate's court for trial: A

(1) The learned magistrate had committed serious errors of law and facts that justified appellate interference. The decision made by the learned magistrate was one that was so repugnant that no reasonable magistrate, having considered all facts and all legal arguments, would have arrived at. The appellant's claim had shown a valid cause of action against the respondent and that the issues raised in the pleadings and the affidavits filed required for deliberation of the said issues by way of a trial. It was not a plainly obviously unsustainable case that justified the utilisation of the powers granted to the magistrate court to strike out the suit (see paras 13–15). B C

(2) The respondent alleged that the appellant had obtained unfettered access to the gymnasium and copied the serial number of the equipment. Therefore, the invoices and the alleged rentals due were incorrect as the respondent claimed that the property belongs to it. This was contradictory to the copy of the confirmation of ownership as shown in exh MH4 which indicated that the said equipment belonged to the appellant. Thus, on this issue alone, the matter could not and should not have been resolved by affidavit evidence alone. The dispute as to the ownership of the equipment and the right to rentals as alleged by the appellant could only be resolved at trial (see para 18). D E

(3) Similarly, the issue as to whether the equipment was correctly rented out by the appellant to the respondent or was undertaken solely with the former chairman should be determined at trial. The court found that the respondent intended to retain the equipment yet at the same time argued that it was the former chairman who should be made responsible for the same. This inconsistent stance indicated that there were issues that required deliberation after trial and not through affidavit evidence alone. There was also no documentary evidence shown by the respondent indicating that they refuted the invoices for the rentals of the equipment on the ground that these items belonged to the respondent as common property of the residents. Hence, this case ought to be sent back to the magistrate's court for determination by way of a full trial (see paras 19–22). F G H

(4) If indeed there was valid agreement between the appellant and the respondent, then the respondent should have allowed the equipment to be returned to the appellant. It could not blow hot and cold at the same time. On the one hand, challenging the existence of the agreement and yet refusing to pay with the intention to retain ownership. This was clearly contradictory and should be resolved at trial. The oral testimony of witnesses, the evidence produced and demeanour at trial would assist I

A the court in determining which version of the facts were correct. This could not be ascertained merely by perusing affidavits alone (see paras 23–24).

(5) The lack of particulars of the amount claimed ie, RM28,286 on its own B did not justify the striking out of the claim. At most, the respondent was entitled to seek further and better particulars from the appellant. This avenue was still available to the respondent and did not justify the striking out of the claim under O 18 r 19 of the Rules of Court 2012 (see para 25).

C (6) The learned magistrate did not peruse the details of the Hire Purchase Act 1967 ('the Hire Purchase Act') and in what circumstances it would be applicable. In this case, the transaction between the appellant and the respondent fell outside the purview of the said Hire Purchase Act. The transaction between the appellant and the respondent would not fall D within the definition of 'consumer goods' and would not fall under the First Schedule of the Hire Purchase Act. The court did not find that the said legislation would be applicable to the circumstances of this case. The learned magistrate should not have struck out the claim in the circumstances of this case. The matter should have been referred for trial E to determine the issues as identified by the court (see paras 29–31).

(7) It was clear that the prayers sought by the appellant were not declaratory reliefs. The main remedies sought were clearly for damages and for the return of the equipment. Therefore, the learned magistrate had F misunderstood the law and had incorrectly struck out the claim on this ground. Even if the reliefs sought were allegedly beyond the powers of the magistrate court, then it should not grant the orders sought at the end of the trial. There was a bona fide claim before it for breach of contract which should be determined. Once liability was shown, the court was G entitled to consider what remedies it should grant at that stage. The same applied to issues of a multiplicity of remedies or confusion of the remedies sought by the appellant. To do as what the learned magistrate had undertaken by striking out the suit on this ground was to put the cart before the horse, which was erroneous and ought to be corrected by the H court (see paras 36–38).

(8) The court found that the error made by the solicitor in drafting the pleading was merely a genuine error of law or erroneous pleadings and was not intended to mislead the court. The learned judicial commissioner referred to s 21(3) of the Strata Management Act 2013 and I found that the said provision did not apply to the contract at hand. The said proviso only applied to 'contract relating to maintenance and management of any building or land intended for subdivision' and not to any contract to supply gymnasium equipment to be used by the residents of the property. The court found that the intention of the said proviso was

clearly limited to the maintenance and management of the building or land that would be subsequently subdivided. They were not to cover all aspects of the management of the common property or services to be provided to the residents of the condominium. This was another error committed by the learned magistrate that required appellate interference (see paras 39–42).

(9) The court found that the errors in the pleadings and affidavits did not materially prejudice the respondent and could be corrected by an order of court. The respondent had not suffered any real prejudice and it was in the interest of justice that the matter be fixed for trial to determine the issue of liability as claimed by the appellant. It was wrong for the learned magistrate to ignore O 1A of the Rules of Court 2012 when coming to the said decision. Errors as those complained by the respondent were not sufficient to justify the striking out of the writ of summons and the statement of claim under O 18 r 19 of the Rules of Court 2012 (see paras 43 & 46–47).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan majistret terpelajar yang membenarkan permohonan yang difailkan oleh responden. Perayu menghujahkan bahawa pada 26 Ogos 2019, dia telah menyewaka dua treadmill untuk kegunaan responden dengan sewa RM1,011 sebulan setiap satu untuk tempoh dua puluh empat bulan. Responden tidak membayar sewa kedua-dua unit tersebut sehingga Julai 2020 dan akibatnya perayu cuba mengambil kembali peralatan-peralatan tersebut. Perayu melalui surat bertarikh 21 Julai 2020 telah menamatkan perjanjian untuk menyewa peralatan tersebut. Walau bagaimanapun, sehingga kini, responden terus menggagalkan percubaan perayu untuk mendapatkan semula pemilikan peralatan-peralatan tersebut. Oleh itu, perayu memfailkan tuntutan di mahkamah majistret. Responden menafikan tuduhan yang dibuat oleh perayu dan juga memfailkan tuntutan balas terhadap seorang penghuni yang didakwa telah bertindak salah sebagai pengerusi badan pengurusan bersama dan harus secara peribadi bertanggungjawab terhadap sewa yang terhutang kepada perayu. Responden seterusnya memohon untuk membatalkan tuntutan perayu mengikut A 18 k 19(1)(a), (1)(b), (1)(c) dan/atau (1)(d) Kaedah-Kaedah Mahkamah 2012. Responden berhujah bahawa tuntutan terhadapnya hendaklah dibuat atas alasan berikut: (a) writ tersebut dikeluarkan secara salah dan bukan di dalam Borang 2A; (b) peguam perayu tidak menandatangani writ saman; (c) tuntutan tersebut adalah pramatang kerana ia dibuat untuk tempoh sehingga Mei 2022; (d) mahkamah majistret tidak mempunyai bidang kuasa untuk memberikan relif deklarasi; (e) mahkamah majistret tidak mempunyai bidang kuasa ke atas harta tak alih; (f) kontrak tersebut tidak sah; (g) perayu menyaman pihak yang salah; dan (h) tuntutan tersebut adalah penyalahgunaan proses mahkamah. Majistret terpelajar

membenarkan permohonan tersebut. Maka, rayuan ini difailkan.

Diputuskan, membenarkan rayuan dengan kos dan meremitkan perkara ke mahkamah majistret untuk dibicarakan:

(1) Majistret terpelajar telah terkhilaf secara serius di dalam undang-undang dan fakta yang membenarkan campur tangan rayuan. Keputusan yang dibuat oleh majistret terpelajar adalah salah satu keputusan yang sangat salah yang mana-mana majistret yang munasabah, setelah mempertimbangkan semua fakta dan semua hujah undang-undang, akan membuat keputusan tersebut. Tuntutan perayu telah menunjukkan kausa tindakan yang sah terhadap responden dan bahawa isu-isu yang dibangkitkan di dalam rayuan dan afidavit yang difailkan memerlukan isu-isu tersebut ditentukan melalui perbicaraan. Ia bukan kes yang jelas tidak boleh dipertahankan yang membenarkan majistret untuk membatalkan saman tersebut (lihat perenggan 13–15).

(2) Responden mendakwa perayu telah mendapat akses terhadap gimnasium dan menyalin nombor siri peralatan-peralatan tersebut. Oleh itu, invois dan sewa yang dikatakan perlu dibayar adalah tidak betul kerana responden mendakwa bahawa harta tersebut adalah miliknya. Ini bercanggah dengan salinan pengesahan pemilikan sebagai ditunjukkan dalam exh MH4 yang menunjukkan bahawa peralatan-peralatan tersebut adalah milik perayu. Oleh itu, dalam isu ini sahaja sudah menunjukkan bahawa ianya tidak sepatutnya diselesaikan dengan bukti afidavit sahaja. Pertikaian mengenai pemilikan peralatan dan hak untuk menyewa seperti yang didakwa oleh perayu hanya dapat diselesaikan di dalam perbicaraan penuh (lihat perenggan 18).

(3) Begitu juga, isu sama ada peralatan tersebut disewakan dengan betul oleh perayu kepada responden atau disewakan kepada dengan bekas pengerusi harus ditentukan semasa perbicaraan. Mahkamah ini mendapati bahawa responden berhasrat untuk mengekalkan peralatan-peralatan tersebut namun pada masa yang sama berhujah bahawa bekas pengerusi yang harus bertanggungjawab untuk perkara yang sama. Pendirian yang tidak konsisten ini menunjukkan bahawa terdapat isu-isu yang memerlukan perbincangan selepas perbicaraan dan bukan melalui bukti afidavit sahaja. Terdapat juga tiada bukti dokumentari yang ditunjukkan oleh responden yang menunjukkan bahawa mereka menafikan invois untuk penyewaan peralatan dengan alasan bahawa barang-barang ini adalah milik responden sebagai harta bersama penduduk. Oleh itu, kes ini harus didengar semula di mahkamah majistret untuk perbicaraan penuh (lihat perenggan 19–22).

(4) Sekiranya terdapat persetujuan yang sah antara perayu dan responden, maka responden sepatutnya membenarkan peralatan tersebut dikembalikan kepada perayu. Responden tidak mempunyai pendirian

yang bercanggah yang mana mencabar kewujudan perjanjian tersebut dan pada masa yang sama enggan membayar dengan niat untuk mengekalkan pemilikan. Hal ini jelas bercanggah dan harus diselesaikan di perbicaraan penuh. Keterangan lisan saksi, bukti yang dikemukakan dan sikap semasa perbicaraan akan membantu mahkamah dalam menentukan versi fakta yang betul. Perkara ini tidak dapat dipastikan hanya dengan meneliti afidavit sahaja (lihat perenggan 23–24).

(5) Kekurangan butiran jumlah yang dituntut iaitu, RM28,286 tidak boleh dijadikan alasan pembatalan saman tersebut. Responden berhak untuk mendapatkan maklumat lanjut butiran tersebut daripada perayu. Responden masih berhak untuk melakukan perkara ini dan perkara ini tidak boleh menyebabkan saman dibatalkan dibawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 25).

(6) Majistret terpelajar tidak membaca secara terperinci mengenai Akta Sewa Beli 1967 ('Akta Sewa Beli') dan dalam keadaan apa ianya terpakai. Di dalam kes ini, transaksi antara perayu dan responden jatuh di luar bidang kuasa Akta Sewa Beli tersebut. Transaksi antara perayu dan responden tidak dalam definisi 'barangan pengguna' dan tidak termasuk di bawah Jadual Pertama Akta Sewa Beli. Mahkamah ini tidak mendapati bahawa undang-undang tersebut terpakai kepada keadaan kes ini. Majistret terpelajar tidak sepatutnya membatalkan saman di dalam kes ini. Perkara ini sepatutnya dirujuk untuk perbicaraan untuk menentukan isu-isu seperti yang dikenal pasti oleh mahkamah (lihat perenggan 29–31).

(7) Adalah jelas bahawa relif yang dipohon oleh perayu adalah bukan relif deklarasi. Relif yang dipohon adalah kerosakan dan pengembalian peralatan-peralatan tersebut. Oleh itu, majistret terpelajar telah terkhilaf dari segi undang-undang dan telah terkhilaf dalam membatalkan saman tersebut di atas alasan ini. Walaupun relief yang dipohon dikatakan di luar kuasa mahkamah majistret, maka perintah yang dipohon tidak boleh diberikan pada akhir perbicaraan. Terdapat tuntutan bona fide iaitu pelanggaran kontrak. Setelah liabiliti diputuskan, mahkamah berhak mempertimbangkan remedi yang harus diberikan pada peringkat tersebut. Begitu juga dengan isu-isu kepelbagaian remedi atau kekeliruan remedi yang dipohon oleh perayu. Keputusan yang dilakukan oleh majistret adalah salah dan harus diperbetulkan oleh mahkamah ini (lihat perenggan 36–38).

(8) Mahkamah ini mendapati bahawa kesilapan yang dibuat oleh peguamcara di dalam pleading hanyalah kesilapan undang-undang dan tidak bertujuan untuk mengelirukan mahkamah. Pesuruhjaya kehakiman merujuk kepada s 21(3) Akta Pengurusan Strata 2013 dan mendapati peruntukan tersebut tidak terpakai kepada kontrak ini. Peruntukan tersebut hanya terpakai kepada 'kontrak berkaitan penyelenggaraan dan pengurusan mana-mana bangunan atau tanah yang

dimaksudkan untuk sub-bahagian' dan bukan kepada mana-mana kontrak untuk membekalkan peralatan gimnasium yang akan digunakan oleh penduduk hartanah tersebut. Mahkamah mendapati bahawa niat peruntukan tersebut dibuat tersebut jelas terhad kepada penyelenggaraan dan pengurusan bangunan atau tanah yang kemudiannya akan dibahagikan. Mereka tidak boleh merangkumi semua aspek pengurusan harta atau perkhidmatan bersama yang akan diberikan kepada penduduk kondominium. Ini adalah satu lagi kesilapan yang dilakukan oleh majistret terpelajar yang memerlukan campur tangan rayuan (lihat perenggan 39–42).

(9) Mahkamah ini mendapati bahawa kesilapan dalam rayuan dan afidavit tidak menjejaskan responden secara material dan boleh diperbetulkan dengan perintah mahkamah. Responden tidak mengalami sebarang prasangka sebenar dan demi kepentingan keadilan bahawa perkara tersebut ditetapkan untuk perbicaraan untuk menentukan isu liabiliti seperti yang dituntut oleh perayu. Adalah salah bagi majistret terpelajar untuk tidak mengambilkira A 1A Kaedah-Kaedah Mahkamah 2012 apabila membuat keputusan tersebut. Kesilapan pliding tersebut tidak mencukupi untuk membenarkan pembatalan writ saman dan pernyataan tuntutan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 (lihat perenggan 43 & 46–47).]

Cases referred to

Abd Hamid bin Jaafar (trading as sole proprietor as Bintang Enterprise) v Shamsiah Dan Keluarga Sdn Bhd [2004] 5 MLJ 349; [2004] 5 CLJ 381, HC (refd)

Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal [1995] 2 MLJ 620; [1995] 3 CLJ 35, CA (refd)

Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Ber: KV Sathasivam @ Kumarasamy ex-parte: Phileoallied Bank (Malaysia) Berhad [2004] MLJU 61; [2004] 5 CLJ 549, HC (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428; [2016] 4 CLJ 665, CA (refd)

Tay Choo Foo v Harrisons Holdings (M) Bhd [2001] MLJU 105; [2001] 4 CLJ 52, HC (refd)

YAB Dato Dr Zambry bin Abd Kadir & 6 Ors v YB Sivakumar Varatharaju Naidy; AG Malaysia (intervener) [2009] 4 MLJ 24, FC (refd)

Legislation referred to

Hire Purchase Act 1967 First Schedule

Rules of Court 2012 O 1A, O 18 r 19, O 18 r 19(1)(a), (1)(b), (1)(c), (1)(d), Form 2A

Specific Relief Act 1950 s 41

Strata Management Act 2013 s 21(3)
Strata Titles Act 1985

V Manokaran (Daniel Choo with him) (Yohendra Nadarajan) for the appellant.
Aaron Pang (Aaron Pang & Co) for the respondent.

Mohd Arief JC:

INTRODUCTION

[1] This is the appeal filed by one Mohamed Hanan bin Mohammed Ali, the appellant, against the decision of the learned magistrate that had allowed the striking out application filed by the respondent, the joint management body of the property set up pursuant to the Strata Titles Act 1985.

[2] The appellant claims that on 26 August 2019, he had provided for rentals two treadmills for the use of the respondent with the rentals of RM1,011 per month each for a period of 24 months.

[3] The respondent did not pay for the rentals of the two units up to July 2020 and as a result the appellant tried to repossess the said equipment.

[4] The appellant by letter dated 21 July 2020 terminate the agreement to rent the said equipment. However, till to date, the respondent continued to stop any attempt by the appellant to regain possession of the equipment.

[5] The appellant sought the following orders before the magistrate court:

(a) damages for rentals to the sum of RM26,286;

(b) the return of the equipment;

(c) an order to stop the defendant/respondent from allowing the plaintiff/appellant from repossessing the equipment;

(d) exemplary damages; and

(e) interest and costs.

[6] The respondent denies the allegations made by the appellant.

[7] In its defence and counterclaim, it alleges that:

(a) it is not entitled to enter into any contract beyond 24 months;

(b) the rentals of the equipment were made without the approval of the residents at an Annual General Meeting;

(c) the appellant was appointed to undertake repairs of the other gymnasium equipment owned by the respondent;

(d) the said equipment were items belonging to the common property of the residents; and

(e) the appellant had no locus standi to repossess the equipment.

[8] The respondent also filed a counterclaim against a resident of the property who it alleges had acted wrongfully as chairperson of the joint management body and should be made personally liable for the rentals owed to the appellant.

DECISION OF THE MAGISTRATE COURT

[9] The respondent applied to strike out the appellant's claim pursuant to O 18 r 19(1)(a), (1)(b) and/or (1)(c) and/or (1)(d) of the Rules of Court 2012.

[10] The respondent opines that the claim against it should be struck out on the following grounds:

(a) the writ was issued wrongly and not in Form 2A;

(b) the plaintiff's solicitors did not sign the writ of summons;

(c) the claim is premature as it was made for the period until May 2022;

(d) the magistrate court did not have jurisdiction to make any declaratory relief;

(e) the magistrate court did not have jurisdiction over immovable property;

(f) the contract is invalid;

(g) the appellant is suing the wrong party; and

(h) abuse of process of this court.

[11] The learned magistrate allowed the application and hence this appeal.

[12] The learned magistrate's grounds for allowing for the said application are summarised as follows:

(a) there were errors in the writ of summons and statement of claim. The writ of summons and the amended writ were signed by Messrs Netto & Yohendra. The court accepts that this was an oversight and should be corrected;

(b) as the error was not corrected, the said error became an error that is not capable of being cured and justifies the striking out of the same. The

learned magistrate relied on *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105; [2001] 4 CLJ 52;

(c) the reliefs sought in this case are contradictory to one another, consists of declaratory reliefs and are beyond the scope of powers provided to the magistrate court;

(d) the affidavits filed by the appellant were undated and unattested in encl 16 but were subsequently supplemented by an affirmed affidavit in encl 22;

(e) the alleged contradictory position that the joint management body was set up under the previous Strata Titles Act and not under the Strata Management Act; and

(f) the alleged inconsistencies in the claim filed by the appellant and the affidavit in support.

C. DECISION OF THIS COURT

[13] After considering the facts presented in this case, I believe the learned magistrate had committed serious errors of law and facts that justify appellate interference.

[14] I am further of the opinion that the decision made by the learned magistrate was one that was so repugnant that no reasonable magistrate, having considered all facts and all legal arguments, would have arrived at. I refer to the decision of the Court of Appeal in *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; [2016] 4 CLJ 665.

[15] I am also of the opinion that the appellant's claim has shown a valid cause of action against the respondent and that the issues raised in the pleadings and the affidavits filed require for deliberation of the said issues by way of a trial. This is not a plainly obviously unsustainable case that justifies the utilisation of the powers granted to the magistrate court to strike out the suit. See *Bandar Builder Sdn Bhd v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36.

ISSUES THAT REQUIRE TRIAL

Ownership of the equipment

[16] When I peruse and consider the written submissions by the respondent, it seems to me that the dispute arises as a result of the change in the personalities that make up of the Joint Management Committee and the removal of the former Chairman, one B Kanaga Raj a/l Balasubramaniam, who is now a party to this suit in the respondent's counterclaim.

[17] The respondent alleges that the appellant had obtained unfettered access to the gymnasium and copied the serial number of the equipment. Therefore, the invoices and the alleged rentals due are incorrect as the respondent claims that the property belongs to it.

[18] This is contradictory to the copy of the confirmation of ownership as shown in exh MH4 which indicates that the said equipment belongs to the appellant. Thus, on this issue alone, the matter could not and should not have been resolved by affidavit evidence alone. The dispute as to the ownership of the equipment and the right to rentals as alleged by the appellant can only be resolved at trial.

[19] Furthermore, the issue as to whether the equipment was correctly rented out by the appellant to the respondent or was undertaken solely with B Kanaga should be determined at trial. Invoices were shown to have been issued and accepted by the respondent for the rentals of the said equipment. Yet at the same time, the respondent now alleges that these sums should be paid by B Kanaga and yet at the same time, the attempts to repossess them were refused by the respondent.

[20] It is strange that this court finds that the respondent intends to retain the equipment yet at the same time argues that it is B Kanaga who should be made responsible for the same. This inconsistent stance indicates that there are issues that require deliberation after trial and not through affidavit evidence alone.

[21] Furthermore, there is no documentary evidence shown by the respondent indicating that they refute the invoices for the rentals of the equipment on the ground that these items belonged to the respondent as a common property of the residents. Again, the position taken by the respondent is inconsistent and cannot be accepted by a court of law solely on affidavit evidence alone.

[22] This issue on its own justifies that this case be sent back before the magistrate court for determination by way of a full trial.

Whether there was a valid binding agreement between the appellant and the respondent

[23] The same can be said as to the respondent's contention that there was no valid agreement between it and the appellant. The quotation was executed by the respondent's own chairman, B Kanaga. This was followed by the delivery of the equipment and the issuance of the invoices to the respondent.

[24] If indeed there was no such agreement, then the respondent should have allowed the equipment to be returned to the appellant. It cannot blow hot and cold at the same time. On the one hand, challenging the existence of the agreement and yet refusing to pay with the intention to retain ownership. This is clearly contradictory and should be resolved at trial. The oral testimony of witnesses, the evidence produced and demeanour at trial will assist court in determining which version of the facts are correct. This cannot be ascertained merely by perusing affidavits alone.

Lack of particulars not ground for striking out

[25] The second argument put forward by the respondent concerns the lack of particulars of the amount claimed ie, RM28,286. This on its own does not justify the striking out of the claim. At most, the respondent is entitled to seek further and better particulars from the appellant. This avenue is still available to the respondent and does not justify the striking out of the claim under O 18 r 19 of the Rules of Court 2012.

Alleged contravention of the Hire Purchase Act

[26] When I consider the pleaded case, I do not find that this was part of the appellant's claim before the learned magistrate. The claim as pleaded is a simple case where there was an alleged agreement to rent the equipment. This type of rental agreement does not fall within the purview of the Hire Purchase Act 1967.

[27] I was also referred to a quotation issued by the appellant to one Mr Kugan and one Mr Murali Dass dated 14 June 2019. The quotation was issued to the respondent but was addressed specifically to the aforesaid individuals.

[28] It was argued by the respondent and agreed to by the magistrate, as the goods were rented out for a period of 24 months with the right to retain it subsequently, they fall under the Hire Purchase Act. Due to the alleged failure to comply with the provision therein, the said agreement becomes a void agreement in law.

[29] Unfortunately, the learned magistrate did not peruse the details of the Hire Purchase Act and in what circumstances it will be applicable. In this case, I am of the opinion that the transaction between the appellant and the respondent falls outside the purview of the said Hire Purchase Act.

[30] It is important that I note that the term 'consumer goods' is defined

under the Hire Purchase Act specifically as goods purchased for personal, family or household purposes.

[31] Therefore, the transaction between the appellant and the respondent would not fall within the said definition and will not fall under the First Schedule of the said Hire Purchase Act. I do not find that the said legislation will be applicable to the circumstances of this case. The learned magistrate should not have struck out the claim in the circumstances of this case. The matter should have been referred for trial to be determine the issues as identified by this court.

Alleged inconsistency in the prayers sought and alleged declaratory reliefs sought not ground for striking out

[32] The learned magistrate is correct in holding that she did not have any powers to make declaratory orders as those powers have not been specifically afforded to the magistrate court.

[33] However, the magistrate court had misunderstood the law. The reliefs sought by the appellant are not in the form of any declaration and are only seeking remedies for damages and for the recovery of the said goods.

[34] To understand what is a declaratory order, one must first understand the source of the power of courts to make such an order. This can be found under s 41 of the Specific Relief Act and under the inherent jurisdiction of the Malaysian courts. See *Attorney General of Hong Kong v Zauyah Wan Chik & Ors and another appeal* [1995] 2 MLJ 620; [1995] 3 CLJ 35 and *YAB Dato Dr Zambry bin Abd Kadir & 6 ors v YB Sivakumar Varatharaju Naidy; AG Malaysia (intervener)* [2009] 4 MLJ 24.

[35] Section 41 of the Specific Relief Act is reproduced herein:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> Examples are also clearly stated in the said legislation which are as follows:
>
> (a) *A* bequeaths his property to *B*, *C* and *D*, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against *A*'s executor, the court may declare whether *B*, *C* and *D* took the property absolutely, or only for their lives, and it may also declare the interests of the

children before their rights are vested.

(b) *A* covenants that, if he should at any time be entitled to property exceeding RM100,000, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

(c) *A* is in possession of certain property. *B*, alleging that he is the owner of the property, requires *A* to deliver it to him. *A* may obtain a declaration of his right to hold the property.

(d) *A* bequeaths property to *B* for his life, with remainder to *B*'s wife and her children, if any, by *B*, but, if *B* die without any wife or children to *C*, *B* has a putative wife, *D*, and children, but *C* denies that *B* and *D* were ever lawfully married; *D* and her children may, in *B*'s lifetime, institute a suit against *C* and obtain therein a declaration that they are truly the wife and children of *B*.

[36] When one compares the reliefs sought by the appellant in this suit and the examples as shown above, it is clear that the prayers sought by the appellant are not declaratory reliefs. The main remedies sought are clearly for damages and for the return of the equipment. Therefore, the learned magistrate had misunderstood the law and had incorrectly struck out the claim on this ground.

[37] Furthermore, I am of the opinion that even if the reliefs sought are allegedly beyond the powers of the magistrate court, then it should not grant the orders sought at the end of the trial. There is a bona fide claim before it for breach of contract which should be determined. Once liability is shown, the court is entitled to consider what remedies that it should grant at that stage.

[38] The same applies to issues of a multiplicity of remedies or confusion of the remedies sought by the appellant. To do as what the learned magistrate had undertaken by striking out the suit on this ground is to put the cart before the horse, which is erroneous and ought to be corrected by this court.

Alleged contravention of the Strata Management Act

[39] The respondent also relies on s 21(3) of the Strata Management Act and alleges that the error of the appellant in referring to the Strata Titles Act is an attempt to mislead the court below and this court.

[40] However, I find that the error made by the solicitor in drafting the pleading was merely a genuine error of law or erroneous pleadings and was not intended to mislead this court.

[41] I have also considered s 21(3) of the Strata Management Act and find that the said provision does not apply to the contract at hand. The said proviso only applies to 'contract relating to maintenance and management of any building or land intended for subdivision' and not to any contract to supply gymnasium equipment to be used by the residents of the property.

[42] I find that the intention of the said proviso is clearly limited to the maintenance and management of building or land that would be subsequently subdivided. They are not to cover all aspects of the management of the common property or services to be provided to the residents of the condominium. This is another error committed by the learned magistrate that requires appellate interference.

Errors in pleadings and affidavits by the appellant

[43] I note that there were errors by the solicitors for the appellant. This started from the outset of the suit when the writ was filed. However, I find that these errors did not materially prejudice the respondent and can be corrected by an order of court.

[44] In coming to her decision, the learned magistrate judge did state that these errors were incurable and relied on *Tay Choo Foo v Harrisons Holdings (M) Bhd* [2001] MLJU 105; [2001] 4 CLJ 52.

[45] However, with the introduction of O 1A, I am of the opinion that the position that should be taken by judges have since moved on from the position espoused in the aforesaid case. Judges are now concerned with the overriding interest of justice and whether the litigants have been put to substantial distress and suffer any form of disadvantage as a result of any errors.

[46] I find that the respondent has not suffered any real prejudice and that it is in the interest of justice that the matter be fixed for trial to determine the issue of liability as claimed by the plaintiff. I, therefore, hold that it was wrong for the learned magistrate to ignore O 1A when coming to the said decision. I refer to the decision of *Abd Hamid bin Jaafar (trading as sole proprietor as Bintang Enterprise) v Shamsiah Dan Keluarga Sdn Bhd* [2004] 5 MLJ 349; [2004] 5 CLJ 381 and *Ber: KV Sathasivam @ Kumarasamy ex-parte: Phileoallied Bank (Malaysia) Berhad* [2004] MLJU 61; [2004] 5 CLJ 549.

[47] Errors as those complained by the respondent are not sufficient to justify the striking out of the writ of summons and the statement of claim under O 18 r 19 of the Rules of Court. There exist a valid cause of action that should be deliberated and considered at trial by the magistrate court.

ORDERS OF THIS COURT

[48] Given the above, I make the following orders:

(a) appeal is allowed and the orders made by the magistrate court are set aside;

(b) the matter is remitted to the magistrate court to be heard by another judge by way of a trial; and

(c) costs of RM5,000 for this appeal and the costs below subject to allocator to be paid forthwith by the respondent to the appellant.

Appeal allowed with costs, and matter remitted to the magistrate's court for trial.

Reported by Muhamad Azham Marwan